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U.S. Citizenship
and Immigration
Services

B5

FILE:

EAC 04 054 51520

Office: VERMONT SERVICE CENTER

Date: **AUG 10 2005**

IN RE:

Petitioner:
Beneficiary:

PETITION:

Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an IT consulting and software development company. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on October 9, 2002. The proffered wage as stated on the Form ETA 750 is \$85,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of October 2002.

On the petition, the petitioner claimed to have been established in 2001, to have a gross annual income of \$160,463, a net annual income of \$25,884 and to currently employ four workers. In support of the petition, the petitioner submitted Form 1120-A U.S. Corporation Short Form Income Tax Returns for the petitioner for the years 2001 and 2002. As only the petitioner's 2002 tax returns are relevant to the petitioner's ability to pay the proffered wage as of October 9, 2002, we will not consider its 2001 tax returns. On appeal, the petitioner submits its 2003 tax return.

The petitioner's tax returns reflect the following information:

	2002	2003
Net income	\$25,884	\$50,986
Current Assets	\$19,916	\$31,176
Current Liabilities	\$3,965	\$1,046
Net current assets	\$15,951	\$30,132

In addition, the petitioner submitted copies of the petitioner's checking account statements for the period from January 2002 and March 2002, the 2002 Form W-2, Wage and Tax Statements the petitioner issued to the

beneficiary for \$12,000 and pay statements for the beneficiary reflecting year-to-date wages of \$36,000 as of November 28, 2003. The Forms W-2 Wage and Tax Statements and pay statements reflect wages far less than the proffered wage, even prorated for the period during which the beneficiary was paid.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on August 9, 2004, denied the petition.

On appeal, counsel asserts that consideration of the petitioner's net income is overly strict. Counsel notes the petitioner's increase in gross income between 2002 and 2003. Counsel asserts that the director should have added back in the petitioner's depreciation and notes that the petitioner is not obligated to pay the proffered wage until after the beneficiary adjusts status to that of a lawful permanent resident. The petitioner submits the aforementioned 2003 tax return.

The petitioner's reliance on the balances in its bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. Regardless, the bank statements submitted relate to March 2002 at the latest, seven months prior to the priority date.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2002 or 2003.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Contrary to counsel's claim on appeal, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang*, 719 F. Supp. at 537. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

While the petitioner did not pay the full proffered wage in 2003, it paid the beneficiary \$36,000 as of November 28, 2003, \$49,000 less than the proffered wage. The petitioner's net income in 2003, not before the director but submitted on appeal, now sufficiently establishes the petitioner's ability to pay the difference between the wages paid and the proffered wage in that year.

The petitioner has also not demonstrated that it paid the full proffered wage in 2002. Rather, the petitioner paid the beneficiary \$65,450 less than the proffered wage in that year. In 2002, the petitioner shows a net income of only \$25,884 and net current assets of only \$15,951.² The petitioner has not, therefore, demonstrated the ability to pay the difference between the wages paid and the proffered wage out of its net income or net current assets in 2002. While the petitioner may not be obligated to pay the beneficiary the proffered wage prior to the beneficiary's adjustment of status,³ it is required to demonstrate an ability to do so. The petitioner has not demonstrated that any other funds were available to pay the proffered wage in 2002 as the bank statements cover only two months and both months are prior to the priority date. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2002.

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

² We will not prorate the proffered wage when considering net income for a 12-month period as such a consideration makes no more sense than considering net income over a 24-month period towards an ability to pay the full proffered annual wage. Even if we were to prorate the proffered wage for 2002 when considering the net current assets, a "snapshot" figure as of a date certain, the record lacks the petitioner's bank statements for October, November and December 2002 reflecting sufficient balances to cover the monthly proffered wage in each of those months. (We note that any funds expended to pay the monthly wage would no longer be available in the following month.)

³ While not related to this adjudication, the petitioner does have certain responsibilities based on its nonimmigrant support of the beneficiary. The record reflects that as of November 28, 2003 (90 percent into the year) the petitioner had only paid the beneficiary 47 percent of 90 percent of the proffered wage for the same position listed on the labor certification. Thus, there is some question as to whether the petitioner is fulfilling its responsibilities to the beneficiary.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.